IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-419

PITTSBURGH PRESS COMPANY, *Petitioner*

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH,

AND

THE NATIONAL ORGANIZATION FOR WOMEN, INC.

BRIEF OF AMICUS CURIAE, THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PRELIMINARY STATEMENT

The American Newspaper Publishers Association files this brief as amicus curiae, respectfully urging that this Court issue a writ of certiorari to review the decision of the Supreme Court of Pennsylvania entered in this case on June 21, 1972, denying the petition of the Pittsburgh Press Company for allowance of an

appeal to review the order and decision of the Commonwealth Court of Pennsylvania entered January 27, 1972.

INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association (hereinafter referred to as "ANPA" or the "Association") is a non-profit, membership corporation organized and existing under the laws of the State of New York. Its membership consists of more than 1,000 daily newspapers, representing over ninety percent of the total daily and Sunday newspaper circulation in the United States. The Pittsburgh Press, the Pittsburgh Post-Gazette, and seventy-four other newspapers located throughout Pennsylvania, hold membership in the ANPA.

Many of the Association's members utilize a gender classification system in their help-wanted advertising sections almost identical to that utilized by the Pittsburgh Press and contested in this action. The majority of the Association's member newspapers have found through years of experience that the system of help-wanted advertising classification that best serves the interests of a significant majority of the job-seeking public, is one which provides advertisers with three column headings (male-female-neuter) under which to place their employment advertisements.

This manner of newspaper advertising display was not instituted nor is it maintained by newspapers to thwart employment opportunities for any sex. Instead, this classification system has, over the years accommodated the desires of those whom it serves in setting out classified ads in the simplest, best and most practical way. It provides the advertiser-employer with a prag-

matic vehicle to reach the audience most probably interested in the position advertised. Moreover, most statutes and ordinances similar to the Pittsburgh city ordinance grant exemptions from coverage to certain employers and for certain jobs. Consequently, and for that reason alone, the Pittsburgh Press and the Association's members are entitled to maintain its classification system.

To the knowledge of your amicus, this is the first state litigation involving the question of the legality of sex classification in the help-wanted advertising sections of newspapers.[1] For this reason, this decision below obviously will have great impact, not only in Pittsburgh and the remainder of Pennsylvania,[2] but also throughout the United States where similar statutes exist. Because of this probable impact, your amicus

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[1] Two federal cases have touched peripherally on this question Neither has reached the merits of the issue involved in this appeal. *N.P.A.* v. *Alexander*, 294 F.Supp. 1100 (D.D.C. 1968) concentrated on both the statutory authority of the Equal Employment Opportunity Commission to promulgate "guidelines" purporting to be substantive regulations and the legal effect of such "guidelines." The former issue remains unresolved by that litigation. But, in connection with the latter issue, the Court held that such "guidelines" do not have the force and effect of law. *Brush* v. *San Francisco Newspaper Printing Co.*, 315 F.Supp. 577 (N.D. Calif. 1970), now on appeal, involved the novel question of whether a newspaper, by publishing help-wanted advertising, was an "employment agency" within the meaning of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(c). The Court in *Brush* had no difficulty in concluding that such activity did not make newspapers "employment agencies" either within the meaning of the Act or within the commonly understood meaning of the term. *See also*, *Greenfield* v. *Field Enterprises, Inc.*, C. A. No. 71 c 2075 (N.D. Ill. E. Div., decided Feb. 1, 1972).

[2] The section of the Pittsburgh ordinance involved herein closely follows its sister section in the Pennsylvania Human Relations Act, 1955, Oct. 27, P.L. 744, as amended, 43 P.S. 951, 955.

desires to present to this Court for its assistance, the views of the majority of its members in regard to the legality of applying Section 8(j) of the Pittsburgh Human Relations Ordinance to newspapers.

REASONS FOR GRANTING THE WRIT

Without any proof that an employer-advertiser violated the advertising proscriptions of Section 8(e) of the Pittsburgh Human Relations Ordinance,[3] the Pittsburgh Human Relations Commission held that by merely maintaining gender-designated columns for help-wanted classified advertising, the Pittsburgh Press "aided or abetted"[4] employers in the commission of an unlawful employment practice.[5] Accordingly, the Commission ordered the newspaper to totally eliminate the gender-designated column headings.[6]

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[3] Section 8(e), as amended, provides: "It shall be an unlawful practice . . . (e) For any "employer," employment agency or labor organization to publish or circulate, or to cause to be published or circulated, any notice or advertisement relating to "employment" or membership which indicates any discrimination because of race, color, religion, ancestry, national origin or place of birth."

[4] The aiding and abetting provisions of the Ordinance are set forth in Section 8(j) which provides: "It shall be an unlawful employment practice . . . (j) For any person, whether or not an employer, employment agency, or labor organization, to aid, incite, compel, coerce, or participate in the doing of any act declared to be an unlawful employment practice by this ordinance, or to obstruct or prevent any person from enforcing or complying with the provisions of this ordinance or any rule, regulation, or order of the Commission, or to attempt directly or indirectly to commit any act declared by this ordinance to be an unlawful employment practice."

[5] See the decision of the Pittsburgh Human Relations Commission at p. 1a, 17a of the Appendix to the Petition for a Writ of Certiorari, filed herein.

[6] See order of Pittsburgh Human Relations Commission at p. 18 of the Appendix to the Petition for a Writ of Certiorari filed herein.

Pursuant to Pennsylvania's procedure, the Pittsburgh Press appealed the Commission order and decision to the Court of Common Pleas of Allegheny County, Pennsylvania. That court affirmed the Commission holding in its entirety.[7] Thereafter the Press appealed to the Commonwealth Court of Pennsylvania, and that court affirmed the Commission's order, but slightly modified the order to require elimination of all sex designated column headings, "except as may be exempt under said ordinance."[8] The Supreme Court of Pennsylvania denied the petition of the Press for allowance of an appeal from the Commonwealth Court's decision.[9]

As a result of these decisions, a serious legal anomaly applies to newspapers in connection with the publication of help-wanted, classified advertising. The tribunals below have held that the elements of principal-accessory need not be shown to hold newspapers in violation of the ordinance. Instead, the Press has been found in this proceeding to have aided and abetted employer advertisers in violating the advertising proscriptions of section 8(e)-(j) of the Ordinance, without any finding or proof that any principal violated the ordinance. This is a criminal ordinance providing monetary and jail penalties. The holdings below that a newspaper, by maintaining such column headings aids and abets an unknown act by an unknown person cannot be left stand-

[7] See opinion and order of Court of Common Pleas of Allegheny County, Pennsylvania, at p. 196 of the Appendix to the Petition for a Writ of Certiorari filed herein.

[8] See order of Commonwealth Court of Pennsylvania, at p. 69a of the Appendix to the Petition for a Writ of Certiorari filed herein.

[9] See order of Supreme Court of Pennsylvania, at p. 80a of the Appendix to the Petition for a Writ of Certiorari filed herein.

ing. Yet, without review by this Court this anomaly will exist; and these undisturbed decisions obviously will have far reaching national impact on this aspect of the newspaper publishing business.

Moreover, the decisions below hold that a newspaper may not maintain gender-designated column headings in its help-wanted classified section unless there is an exemption for the advertised job contained in the ordinance. Putting aside for a moment the difficult practical problems of what those holdings mean, it is clear that the tribunals below have unlawfully invaded the area of editorial prerogative. Although few, if any, court decisions have sought to reach or even trace the outer limits of such judgment, it must be recognized that a newspaper's decision as to how advertising shall be displayed in as much an editorial function as its decision as to how its editorial page shall be constructed or what its editorial position shall be on a particular issue of the moment.

We recognize that to those outside the newspaper business, decisions surrounding advertising display may not appear as important as those surrounding other editorial functions. But even one outside the field of journalism would admit that whatever difference exists between the two is only a matter of degree. Both are editorial in nature; infringement of what some may consider the lesser only provides a basis or precedent for a later infringement of the other. This point should not be considered an argument *ad terrorem,* for rights are eroded by slow, almost imperceptible steps, each one providing a precedent for the next. Quite apart from seeking to correct the underlying erroneous interpretation given to Section 8(j) by both bodies below, this Association endeavors to prevent even the smallest step

from being taken which would undermine a newspaper's right to make such editorial policy judgments.

Apparently, the argument for applying Section 8(j) to newspapers proceeds along the following lines. The classified advertising employee taking the advertisement over the telephone or from the mails, is presumed to know whether an advertiser is covered or not covered by the Ordinance. Further, the classified ad taker is presumed to know whether a bona fide occupational qualication exists for the position to be advertised. Finally, acting on the request of the advertiser by inserting these advertisements in columns headed by sex makes the newspaper an aider or abetor within the meaning of Section 8(j) based on its presumed knowledge. Therefore, the argument goes, advertiser and the newspaper, by placing the advertisement in columns labeled by sex *ipso facto,* and without regard to any other question, perpetrate an unlawful employment practice. Although presumed knowledge is the basis for application of Section 8(j) to newspapers, the Court below anomalously stated that newspapers had no duty to screen any employment advertisement.

An examination of analogous cases in the field of false advertising demonstrates the fallacy of this argument. It is an unlawful practice in most states, and under the United States Federal Trade Commission Act, to publish or cause to be published an untrue, false, or misleading advertisement. See e.g., 18 P.S. 4857 (1963); 15 U.S.C. § 52 (1964). Also, most of the state statutes, in one form or another, prohibit one from aiding or abetting the publication of such false advertising However, in no case has the offense of aiding or abetting such false publication been construed to extend to the acceptance and publication of such advertising by a newspaper. In

fact, the extant case law flatly rejects such a construction.[10]

By applying the aiding and abetting provisions to the Pittsburgh Press, the courts and the Commission have made the newspapers of the City of Pittsburgh the enforcement arm of the Pittsburgh Commission on Human Relations in the help-wanted advertising area. Newspapers are, therefore, required to make instantaneous judgments as to whether the placement of an advertisement over a gender-designated column heading runs afoul 8(j).

Given the impracticality of forcing the newspapers to be the enforcement arm of the Pittsburgh Human Relations Commission regarding classified help-wanted advertisements, it is clear that the attempt on the part of the state courts to extend the terms of Section 8(j) of the Ordinance to apply to newspapers runs contra to the First Amendment to the United States Constitution. Certainly, a municipality cannot pierce the shield of the First Amendment to require newspapers to act as their enforcement agency. Further, if Section 8(j) were construed to apply to newspapers in accepting advertisements, newspapers would essentially be required to censor and screen all help-wanted advertisements which come into their offices. Such interference with the day-to-day operations of newpapers is clearly pro-

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[10] Presently, the overwhelming majority of State Printers Ink statutes exempt newspapers from coverage. In the one or two that purportedly cover newspapers in publishing false advertising, coverage is limited to only the event where a newspaper publishes the contested advertisement with actual knowledge of its falsity. *See generally*, Note, *Regulation of Advertising*, 56 Colum. L.Rev. 1018 (1956); *Goldsmith* v. *Jewish Press Pub. Co.*, *Amalgamated Furniture Factories, Inc.* v. *Rochester Times-Union, Inc.*, 128 Misc. 673, 219 N.Y.S. 705 (1927)

scribed by the First Amendment. If a municipality can accomplish such an end under the circumstances of this case, there is little to stop it from making newspapers its enforcement arm in other situations. Such attempts, we strongly urge, are precluded by the First Amendment. *See, Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936); *Near* v. *Minnesota*, 283 U.S. 697 (1931); *New York Times Co.* v. *United States*, U.S. , 39 U.S.L.W. 4879 (U.S. June 30, 1971).

CONCLUSION

For the reasons stated herein, the American Newspapers Publishers Association strongly urges this Court to grant the Petition for a Writ Of Certiorari filed herein.

Respectfully submitted,

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